

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company	:	
	:	ICC Docket No. 10-04676
Proposed General Increase in Rates.	:	

**VERIFIED APPLICATION FOR REHEARING OF
THE COALITION TO REQUEST EQUITABLE
ALLOCATION OF COSTS TOGETHER**

December 6, 2010

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The Coalition to Request Equitable Allocation of Costs Together (“REACT”),¹ respectfully submits this Verified Application for Rehearing of the Order entered by the Illinois Commerce Commission (the “Commission”) on November 4, 2010 and served on the parties on November 5, 2010 (the “Order”) regarding REACT’s Petition for Interlocutory Review (“REACT Petition”) of the Administrative Law Judges’ (“ALJs”) September 17, 2010 Order (“ALJ Order”). In support of this Application for Rehearing, which seeks dismissal without prejudice of the above-captioned matter due to the failure of Commonwealth Edison Company (“ComEd”) to comply with the Commission’s Final Order in the Special Investigation Proceeding (ICC Docket No. 08-0532), REACT states as follows:

¹ The customer members of REACT currently are: A. Finkl & Sons Company; Aux Sable Liquid Products, LP; the City of Chicago; Flint Hills Resources, LP; FutureMark Paper Company (formerly known as the Alsip Paper Condominium Association); the Metropolitan Water Reclamation District of Greater Chicago; PDV Midwest Refining LLC; United Airlines, Inc.; and Wells Manufacturing Company. All of these REACT customer members participated in the 2007 ComEd Rate Case and the 2008 ComEd Special Investigation Proceeding as members of REACT. REACT’s supplier members currently are Commerce Energy, Inc.; Integrys Energy Services, Inc.; and Interstate Gas Supply of Illinois, Inc. The positions stated herein do not necessarily represent the positions of any individual member of REACT. The City of Chicago does not join in this Application.

I.

INTRODUCTION

ComEd has created a situation that undoubtedly puts the Commission in a difficult and unfair position. On one hand, ComEd has failed to comply with a clear Commission Order, and directly challenged the Commission's power to enforce its own Orders. On the other hand, due to the timing realities of litigation, the Commission was not able to consider this issue until well after the present case was underway. As a result, the Commission faced a difficult decision pitting the necessity of a definitive and forceful ruling that it has the power to enforce its Orders with the desire to efficiently run its docket. For the reasons stated below -- including the need for consequences for ComEd's actions and ComEd's continuing non-compliance -- REACT respectfully requests that the Commission reconsider its balance of those competing objectives, and impose consequences upon ComEd for failing to follow the Commission's clear and direct Order.

The Commission is familiar with the parties and procedural history behind this Application and the underlying REACT Petition and Motion to Dismiss. (*See, e.g.*, REACT Petition at 2-15.) At the November 4, 2010 Bench Session, the Commission considered REACT's Petition for Interlocutory Review of the ALJs' denial of REACT's Motion to Dismiss ("REACT Motion"). Chairman Flores, Commissioner O'Connell-Diaz, and Commissioner Elliott each offered remarks regarding ComEd's actions in the present case. (*See* Nov. 4, 2010 Bench Session Transcript ("Transcript") at 13-18.) Those statements unequivocally concluded that ComEd failed to comply with the Commission's Order in the Special Investigation Proceeding, and unambiguously affirmed that ComEd must comply with previous Commission Orders. (*See id.*)

As established by the Commission's statements and the ALJ Ruling, the fact finders in this case have correctly expressed that ComEd has violated the clear Commission mandates from the 2008 Special Investigation Order. For example, Commissioner Elliott stated: "I think that we were pretty straightforward about what we required of the Company with regard to this issue and I think it's a major flaw in the case." (Transcript at 13-14; *see id.* at 14-18; *see* ALJs' Ruling.) Neither a single Commissioner nor the ALJs suggested that ComEd complied with the Special Investigation Order. Instead, the ALJs and the Commission seemed to suggest to varying degrees that there was still sufficient time to address ComEd's late-filed testimony. This position presumed that ComEd's Supplemental Testimony was substantially compliant and sufficient to allow the Commission to decide the issues at hand, and that ComEd would fill all of the remaining holes by providing appropriate responses to discovery. Now that Staff and the parties' experts have had time to review ComEd's late-filed exhibits and initiate discovery, it is clear that those assumptions were inaccurate.

Despite its clear statements, the Commission did not take the next, necessary, step to impose tangible consequences on ComEd in the form of the requested dismissal without prejudice, a sanction against ComEd that was originally sought not only by REACT, but also by the Illinois Attorney General and Dominion Resources, and supported by Metra and the Citizens Utility Board. REACT appreciates the strong statements made criticizing ComEd, but respectfully requests that the Commission translate those statements into an Order that has tangible consequences for ComEd – namely the dismissal without prejudice of the instant proceeding, or such other affirmative reliefs as the Commission deems appropriate.

II.

THE COMMISSION SHOULD NOT ALLOW COMED TO IGNORE THE CLEAR MANDATE FROM THE COMMISSION'S SPECIAL INVESTIGATION PROCEEDING ORDER

The Commission should dispel any illusion that ComEd or any other party may have that suggests that compliance with Commission Orders is anything but mandatory. The clear statements made at the November 4, 2010 Bench Session leave no doubt that the Commission rightly believes that ComEd should have complied with the Special Investigation Order and, in fact, failed to do so. Accordingly, REACT respectfully requests that the Commission put force behind its admonitions, and enforce consequences for ComEd's continuing disregard of a clear Commission directive. Only with clear consequences will the Commission prevent future parties from similarly violating Commission Orders.

There can be no doubt as to the Commission's position on ComEd's compliance -- or lack thereof -- with the Commission's Order. As Chairman Flores stated:

I can't stress enough how important it is that when the Illinois Commerce Commission makes an Order that all of the litigants before the Commerce Commission who appear before here follow the Orders that this Commission makes. The Orders are extremely important and we take pains to make sure that they are clear so that there is no confusion for all the parties in terms of what it is that the Illinois Commerce Commission expects of all of the litigants who appear before this body. We do so for the purposes of providing all of the parties the opportunity to litigate fairly before the Illinois Commerce Commission.

It is also a disservice to the Illinois Commerce Commission when we do not receive the information that we request from all of the parties in a timely manner. The reason we request this information is for all of us to have an opportunity to review the voluminous records that are typically submitted when you have large cases such as the rate cases that come before the Illinois Commerce Commission. So I can't stress enough how important it is to follow the Orders. I'm very troubled by the fact that an Order was not complied with in this case.

(*Id.* at 14-15.) Commissioners O'Connell-Diaz and Elliot each made similar observations, with Commissioner O'Connell-Diaz stating: "Mr. Chairman, I just agree with the comments that

you've enunciated with regard to the need [for] any litigant at the Commission to follow what the Commission has ordered.” (*Id.* at 15-16.) Similarly, Commissioner Elliot stated:

I participated in the Commission decisions with regard to the Cost of Service Studies and that I think that we were pretty straightforward about what we required of the Company with regard to this issue and I think it's a major flaw in the case.

(Transcript at 13-14.) Chairman Flores and Commissioners O’Connell-Diaz and Elliot could not have been clearer about the need for ComEd to obey Commission Orders. Although Commissioners Ford and Colgan chose not to offer comments, they certainly did not make any indication of a disagreement with their fellow Commissioners regarding ComEd’s behavior.

In light of this unopposed and clear finding, REACT respectfully requests that the Commission impose tangible consequences on ComEd for the violation that a majority of the Commission has unequivocally identified. By declining to impose tangible consequences, the Commission risks -- despite its strong admonitions to the contrary -- *de facto* validation of ComEd’s argument that the Commission does not have the power to require ComEd to comply with direct Orders.² ComEd’s disregard of the Commission should not be allowed to stand; as the Commissioner O’Connell-Diaz made abundantly clear when stating that “it’s kind of puzzling to me that the Company in this instance would not have taken the Commission’s concern about that [Cost of Service Study issues] seriously”. (Transcript at 16-17.)

² As the Commission is fully aware, and as noted in the Bench Memorandum, the Commission undoubtedly has the power to grant the relief requested by REACT for non-compliance with a Commission Order. (*See* October 21, 2010 Memorandum to the Commission at 8; REACT Petition at 17-19.)

Respectfully, the Commission's decision not to impose consequences on ComEd undermines the strongly-worded messages delivered by a majority of the Commission. The unfortunate "bottom line" at this point is that, notwithstanding its clear non-compliance with a Commission Order, ComEd has suffered zero ill effects from its decision to open the present docket with a non-compliant filing. Moreover, as the testimony filed by several parties on November 19, 2010 shows,³ ComEd's Supplemental Filing was still not compliant with the Commission's Order.

Through its continuing disregard of the Commission's Order from the Special Investigation Proceeding, ComEd has created a situation that puts the Commission in a difficult and unfair position. However, by ruling as it has, the Commission has created a situation where a utility's failure to comply with a Commission Order may never become remediable: by crediting ComEd's argument, the timing for dismissal or other sanction will always be either too early to matter or too late to provide meaningful remedies. In other words, despite the clear Commission holding that ComEd -- and all other litigants -- must follow Commission directives, the Commission has provided an "out" to allow the violating parties to avoid consequences. This outcome is contrary to the Commissions' clear statements as to the importance of following Commission Orders. The Commission no doubt desires to avoid creating a precedent under which ignoring Commission Orders has no consequences. This Application for Rehearing asks the Commission to reject that precedent and unambiguously reject any future attempt to ignore clear Commission directives.

³ Neither REACT nor the Commission had the benefit of this testimony during the briefing or decision of the Motion to Dismiss or the Petition.

III.

**THE COMMISSION SHOULD DISMISS THE INSTANT PROCEEDING
BECAUSE STAFF AND INTERVENOR TESTIMONY CONFIRMS THAT
COMED'S SUPPLEMENTAL FILING DID NOT COMPLY WITH THE
COMMISSION'S ORDER AND HAS PREJUDICED STAFF AND OTHER PARTIES**

Even to the extent that ComEd has conducted certain studies that it presented in its Supplemental Testimony, several witnesses now have presented testimony that ComEd's supplemental Embedded Cost of Service Study ("ECOSS") did not satisfy the Commission's Order in the Special Investigation Proceeding. (*See* ComEd Ex. 22.1.) As a result, six months into the instant 11-month proceeding (and one month before the scheduled Evidentiary Hearing), the Commission is faced with a deficient evidentiary record, with a genuine risk that the Rate Case will proceed without the Commission obtaining -- and the parties evaluating -- the information that the Commission directed ComEd to provide in its initial filing. To the extent that the Commission assumed that ComEd has provided the analysis required by the Order -- or that ComEd is filling in gaps in the normal course of discovery -- this assumption has proven to be incorrect.

ComEd's ongoing non-compliance with the Commission's Order is particularly serious with respect to ComEd's ECOSS. Illinois Industrial Energy Consumer ("IIEC") Witness David A. Stowe opined, "Neither of the ECOS studies filed by ComEd fully complies with the Commission's directives in the Rate Design Investigation Order." (*See, e.g.,* IIEC Ex. 3.0, Direct Testimony of David A. Stowe, at 7:146-147.) Other testifying witnesses pointed to additional failures of ComEd's supplemental ECOSS to comply with the Special Investigation Order, including Commission Staff, REACT, IIEC, and City of Chicago witnesses. (*See* Staff Ex. 10.0, Direct Testimony of Peter Lazare, at 19:483-502 (identifying lack of evidence that ComEd complied with certain Special Investigation Order directives); REACT Ex. 1.0, Direct

Testimony of Bradley O. Fults, at 25:623-629 (primary/secondary split); IIEC Ex. 2.0, Direct Testimony of Robert R. Stevens, at 14:344-16:399 (primary/secondary split and exemplar status); City of Chicago Ex. 1.0, Direct Testimony of Edward C. Bodmer, at 40:777-61:1192 (street lighting).) These witnesses identify not just ComEd's failure to make a timely filing that complies with the Commission's prior Order, but also ComEd's *substantive* failure to comply with the actual requirements of the Special Investigation Order. This creates a distressing situation six months into the proceeding; it now is clear that ComEd is seeking to raise electric rates not only based upon an untimely filing, but also upon a filing that is substantively not in compliance with the Commission's Special Investigation Order..

The need for dismissal as a sanction for ComEd's non-compliance is further exemplified in REACT's pending Motion to Compel, which seeks, among other things, information that ComEd has refused to provide about assets used to serve the class of Extra Large Load Customers. Among its excuses for not producing the requested data, ComEd states: "ComEd would have to expend substantial resources **and time** to prepare" the data REACT requested. (ComEd Verified Response to REACT's Motion to Compel, at 5) (emphasis added). In other words, ComEd failed in the first instance to provide the studies required by the Commission Order, and now turns around and refuses to provide the underlying data by saying that it would take too much time -- when ComEd itself made an untimely filing of initial material that substantively lacked information required by the Special Investigation Order. ComEd is now trying to use the illusion of a lack of time to deny REACT and other parties the information that ComEd should have provided originally, if it had obeyed the Commission's Order in the first instance.

In sum, ComEd was under an Order to provide the information with its initial filing; it failed to do so, and now when the parties ask for the information, ComEd points to a lack of time to provide that information. With due respect, the Commission ought not to condone ComEd's conduct.

IV.

CONCLUSION

The Commission has an opportunity to send a strong message to all entities that appear before it that non-compliance with direct Commission Orders will not be condoned. The Commission strongly articulated that policy during its November 4, 2010 Bench Session. However, the Commission's decision not to impose a tangible sanction for ComEd's non-compliance could undermine the Commission's policy and could create an unintentional situation under which non-complying parties would never face consequences. Therefore, REACT respectfully requests that the Commission reinforce its strong words with concrete consequences for ComEd in the present case. An Order dismissing the instant proceeding without prejudice at this time would allow ComEd to refile its Rate Case with testimony that complies both procedurally and substantively with the Commission's Special Investigative Order.

WHEREFORE, REACT respectfully requests that the Commission accept this issue for rehearing, order dismissal of the instant proceeding without prejudice, and provide any further relief as it deems appropriate.

Respectfully submitted,

**THE COALITION TO REQUEST EQUITABLE
ALLOCATION OF COSTS TOGETHER**

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